In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. [illegible]

ROBERT BURKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
First Appellate District, Division Two.

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Subject Index

	Page
Opinion of lower court	2
Questions presented for review	3
Statutes and rules involved	3
Statement of the case	4
Jurisdiction of lower courts	6
Reasons for granting writ of certiorari	6
I. The unsupported excessive part of a judgment and sentence is a deprivation of liberty without due process of law in violation of the XIVth Amendment to the United States Constitution	7
II. Where Constitutional issues are involved they may be raised after time for appeal has expired (or after affirmance)	10
III. If State Courts grant no remedy to protect federal rights in criminal cases, United States Courts will do so	10
Conclusion	11

Table of Authorities Cited

Cases	Pages
De Jonge v. Oregon, 299 U.S. 353	3, 5, 8, 9
Herndon v. Georgia, 295 U.S. 441	6, 10
Herndon v. Lowery, 301 U.S. 242	6, 10
In re Carmen, 48 Cal. 2d 851	6, 7
Johnston v. Zerbst (1938) 304 U.S. 458	7, 10

Pages

McNeal v. Culver (Jan. 23, 1961) 5 L. Ed. 445 ..... 7, 10

Mooney v. Holohan, 294 U.S. 103 ..... 7, 10

Moore v. Dempsey, 261 U.S. 86 10

People v. Carmen, 43 Cal. 2d 342 6

People v. Mintz, 106 Cal. App. 725, 290 P. 93 2

Petition of Carmen, 165 F.S. 942 6

Stromberg v. Calif., 283 U.S. 359, 45 L. Ed. 1117 2

Thompson v. Louisville, 362 U.S. 199 ..... 3, 5, 6, 7, 8, 9

Woods v. Nierstheimer, 328 U.S. 211 ..... 7, 10

Codes

California Penal Code:

Section 187 ..... 1, 3
Section 188 3
Section 190 3
Section 190.1 3
Section 192(1) 3
Section 192(2) 3
Section 193 3
Section 790 6
Section 1181(6) 3
Section 1239 3

28 U.S.C.:

Section 1257(3) 2

Constitutions

California Constitution:

Article VI, Section 4a and 4b 6
Article VI, Section 5 6

United States Constitution:

Amendment XIV 3

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Robert Burks, defendant in the Superior Court of the State of California, in and for the City and County of San Francisco, on a charge of murder (Cal. Pen. Code 187), appellant in the District Court of Appeal of the State of California, First Appellate District, Division Two, petitions for a Writ of Certiorari to review the latter court's affirmance of an order of the said Superior Court denying defendant-petitioner's

motion to reduce the judgment to something less than murder of the first degree, on the ground that, as a matter of law under California law, the evidence did not show murder of the first degree, i.e., did not show the crime for which defendant-petitioner was adjudged guilty and imprisoned, but showed a different and lesser crime, if any.

OPINION OF LOWER COURT

The opinion of the District Court of Appeal, State of California, First Appellate District, Division Two, appears at R. 35. This is the only opinion in the lower courts. It is reported at 189 ACA 329, 11 Cal. Rptr. 200. The District Court of Appeal denied a Petition for Rehearing on March 23, 1961 (R. 36), and the Supreme Court of California denied a Petition for Hearing on April 19, 1961. The Order denying hearing appears at R. 37. A copy of the opinion of the District Court of Appeal is attached as Appendix "A" to this Petition. A copy of its Order Denying Rehearing is attached as Appendix "B". A copy of the California Supreme Court's order denying a hearing is attached as Appendix "C". On July 12, 1961, the Hon. Hugo L. Black extended petitioner's time to petition for a Writ of Certiorari to and including August 17, 1961; and on August 9, 1961 Justice Black further extended the time to August 28, 1961. The Supreme Court has jurisdiction to review the judgment of the District Court of Appeal of California (as the highest state court, under 28 U.S.C. 1257(3). Cf. *Stromberg v. Calif.*, 283 U.S. 359, 45 L. Ed. 1117, *sub nom. People v. Mintz*, 106 Cal. App. 725, 290 P. 93).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Where it is claimed (and, at least for purposes of argument, not denied by the State Court) that a man has been sentenced and imprisoned for a crime greater than any shown by the evidence, is the *excessive part* of the judgment and sentence unconstitutional and void as in violation of the due process clause of the XIV amendment to the United States Constitution for the same reasons that the entire judgment and sentence were unconstitutional and void for lack of supporting evidence of *any* crime in *Thompson v. Louisville,* 362 U.S. 199, 206, and because of the failure of the pleadings to charge a crime which was assumed to have been shown by the evidence in *De Jonge v. Oregon,* 299 U.S. 353, 362?

2. Where the above point is explicitly raised before a state court, may the state court overrule the point without stating what it is or discussing it on the merits?

STATUTES AND RULES INVOLVED

California Penal Code Secs. 187, 188, 190, 190.1;

California Penal Code Secs. 192 (1) and (2), 193;

California Penal Code Sec. 1181 (6);

California Penal Code Sec. 1239.

The text of these statutes is set forth in Appendix "D" to this Petition. A copy of the first section of

Appellant's Opening Brief in the District Court of Appeal, showing federal questions raised, is attached as Appendix "E".

STATEMENT OF THE CASE

The case is partly stated in the opinion of the District Court of Appeal. It sets forth the following part of the facts and proceedings:

(R. 35, Appendix "A", pp. i-ii):

> "The appellant was indicted for first degree murder on July 17, 1958. Trial by jury began on January 5, 1959; during the trial appellant's counsel and the district attorney stipulated that the death of the victim resulted from a gunshot wound from a gun fired by the defendant. Upon submission the jury found him guilty of first degree murder. Thereafter appellant waived his right to jury consideration of the issue of the penalty which was then determined by the court and on January 22, 1959 the court sentenced him to the state prison for the term prescribed by law. No appeal was taken, . . .
>
> "The appellant's first contention is that the evidence was insufficient as a matter of law to show willful, deliberate and premeditated intent to kill required to sustain a finding of first degree murder. . . ."

(R. 35, Appendix "A", p. iii):

> "Counsel points to that portion of appellant's application which carries the designation 'Motion for Reduction of Sentence' and contends that under such a pleading appellant can at this time

and stage of the proceedings question the sufficiency of the evidence . . ."

(R. 35, Appendix "A", p. v):

"The arguments with reference to the alleged constitutional questions are 'ingenious but we are not convinced of their applicability. It is apparent that the appellant should have sought relief for the alleged insufficiency of the evidence through the historic remedial process provided, namely, appeal from the judgment.'

"Order Affirmed."

As can be seen from the above quotation, the District Court of Appeal did not state what the constitutional contentions were. They were (a) as mentioned above, that *as to the excess* of petitioner's judgment and sentence beyond the utmost shown by the evidence, the same constitutional question arises which was decided in favor of the defendant in *Thompson v. Louisville*, 362 U.S. 199, and *De Jonge v. Oregon*, 299 U.S. 353; (b) such a constitutional question may be raised notwithstanding that the time for appeal under state law has expired.

The District Court of Appeal assumes for purposes of argument that the evidence fails to show first degree murder, and that petitioner was guilty only of some lesser crime. It overrules the constitutional argument based upon this state of affairs without discussion or even exposition of the contentions. For this reason only the Clerk's Transcript in the court below is brought up as a record.